RECORD AND BRIEFS

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IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.; AND
JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION;
CHARLIE CRAIG; AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the
Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* C12 GROUP, CHRISTIAN EMPLOYERS ALLIANCE, PINNACLE FORUM, CEO FORUM, INC., CENTER FOR FAITH AND WORK AT LETOURNEAU UNIVERSITY IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The five *amici curiae* joining in this brief are all organizations advancing the biblical principle that Christians must conduct themselves and their businesses in ways that honor and glorify Jesus. Like the Petitioners, Masterpiece Cakeshop, Inc. and Jack Phillips, these organizations and their members believe that their Christian calling is not limited to ceremonial rites but includes all of one's life. They do not see their lives as segmented into "secular" and "religious" compartments. Rather, they see their Christian calling as all-encompassing, indivisible, and under the lordship of Jesus. Their businesses or vocations are no exception to the biblical command that they are to do everything "as for the Lord." Colossians 3:23 (ESV).

The C 12 Group ("C 12") is the largest network of Christian CEOs, business owners, and executives in the United States. At its roundtables, business leaders from multiple industries convene monthly to incorporate best practices through the foundation of biblical principles by sharing ideas, holding each other accountable, and encouraging one another to uphold the core values of a Christian business leader. In so doing, C12 groups seek to build great businesses for a greater purpose. Its members

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[1] Consistent with this Court's Rule 37.6, *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

include 1,420 CEO/Business Owners and 580 Executives representing nearly 1,500 businesses, many of which are closely-held. They span all industry sectors and represent businesses with as few as five and as many as over 15,000 employees.

The Christian Employers Alliance ("CEA") is a business trade association advocating on behalf of its members who desire to operate their businesses in accordance with their faith. Its mission is to unite and equip Christian employers with guidance, unified legal strategies, and practical resources for the well-being of employees, organizations, and communities for God's glory. CEA was formed by Christian leaders from many sectors, including business owners, pastors, and non-profit leaders, who decided to unite their organizations, including businesses, schools, colleges, nursing homes, hospitals, churches, and non-profit ministries, to protect their right to run their organizations in a manner consistent with their Christian beliefs and deeply held convictions and to create Christ centered culture in the workplace.

The Pinnacle Forum America ("Pinnacle") is a non-profit organization devoted to equipping marketplace leaders for personal and cultural transformation in peer forums. Its mission is to encourage and equip influential leaders through forums, supported by a national network, to engage in personal and cultural transformation that honors Jesus. It is comprised of close to 1,000 partners and participants in eighteen states. Its members include

owners of companies and C-level executives. The types of businesses and individuals involved include wealth management, manufacturing of all kinds, consulting of all kinds, publishing, construction, real estate development, bakers, realtors, attorneys, health care providers of all kinds, auto dealers, restaurant owners, CPAs, and product distributors.

The CEO Forum, Inc., supports Christian CEOs and senior executives of major corporations by equipping them to be Christ-following leaders who develop their businesses and employees. Its mission is to develop spiritual statesmen among senior executives of major corporations, and through them, advance the Kingdom of God and improve the business and social cultures of America.

The Center for Faith and Work at LeTourneau University was established to aid Christians in thinking about work and to help them experience Christ's transforming presence and power in every workplace in every nation. The Center aids Christians in their understanding about work by teaching them that their work is significant to God and that every workplace is a strategic place for serving Him. God values all kinds of work and those who do it. The Center does this through courses, seminars, and materials presented in classrooms, churches, and the workplace.

SUMMARY OF THE ARGUMENT

Some businesspersons view their work as a necessary evil; others, as just an honest way to make a living; and yet many see their work as a form of worship and as a calling as religious and divine as that of the clerics and clergy. The apocryphal story[2] about three quarry workers, who were asked by a passerby to describe what they were doing, illustrates this point. The first worker grimly retorted that he was breaking his back cutting stone. The second simply stated that he was making a living. However, the third worker looked at the heavy rocks before him and gladly responded, "God has called me to build a cathedral."

Together the *amici curiae* represent tens of thousands of men and women who view their businesses not just as honest ways to make a living and serve others but as divine callings in which they are to use their God-given skills to accomplish God-ordained purposes. While their skill and station may not be the performance of rites or sacraments, their businesses intimately reflect and are motivated by their religious beliefs and values. This view of work and vocation as a religious calling follows millennia of religious teaching across many faiths and should continue to be respected.

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[2] Adapted from many sources, including Tom Nelson, *Work Matters: Connecting Sunday Worship to Monday Work*, 27 (Crossway 2011).

The *amici curiae*'s interest in this case, and the increasing number of cases[3] like it, stems from the growing concern that their religious exercise and livelihoods will find no protection under this Court's Free Exercise Clause jurisprudence when a legislature, unelected state commission or government agency decides to penalize them for engaging in religiously motivated conduct or to compel them to act in a manner prohibited by their religion. Without the Constitution's protection, the government, and not individual businesspersons, will be the ultimate arbiter of orthodox business practices and the gatekeeper for who may or may not work in a particular field. No one should be forced to choose between being in the marketplace and following their religious convictions absent proof of a truly compelling governmental interest.

While the *amici curiae* join with the Petitioners on their Free Speech Clause arguments, and while this case may be decided in the Petitioners' favor under this Court's robust Free Speech Clause jurisprudence, the *amici curiae* herein seek to bring

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[3] *See, e.g., Lexington Fayette Urb. County Human Rights Comm. v. Hands on Originals, Inc.*, 2015-CA-00745-MR, 2017 WL 2211381 (Ky. App. May 12, 2017) (print shop that declined to print t-shirts for local Pride Festival); *State v. Arlene's Flowers, Inc.*, 389 P.3d 542 (Wash. 2017) (florist who declined to participate in same-sex wedding); *Elane Photo, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (photography company that declined to participate in a same-sex wedding); *Morr-Fitz, Inc. v. Blagojevich*, 901 N.E.2d 373 (Ill. 2008) (pharmacists who in accordance with their moral and religious beliefs refused to dispense Plan B).

to the Court's attention the tens of thousands of Americans who may or may not be engaged in explicitly expressive endeavors like the Petitioners but may nevertheless be forced to abandon their religiously motivated businesses on pain of government prosecution and penalty. Accordingly, this brief will focus first on how faith is an integral part of many Americans' businesses and second on the need to restore the balancing test used in this Court's line of Free Exercise Clause cases before *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990).

ARGUMENT

I. Many Americans Are Compelled by Their Sincerely Held Religious Beliefs to Conduct Their Businesses in Accordance with and As an Expression of Their Faith.

Many of the world's major religions teach that their adherents' whole lives—especially their work—should reflect and bear witness to the values and truth claims of their religion. Their faithful work is not only integral to their vertical relationship with the divine but also critical to how they serve and communicate their religious values in their horizontal relationships with others.

Followers of Jesus are taught to conduct themselves and work in a manner fully pleasing to God. Colossians 1:9 (ESV). They are also commanded to let their light shine before others, so that others

may see their good works and give glory to God in heaven. Matthew 5:15 (ESV). Or as the Apostle Paul succinctly states in 1 Corinthians 7:17 (ESV): "Only let each person lead the life that the Lord has assigned to him, and to which God has called him." As a matter of conscience, Jesus taught that one day God will ask everyone to give an account for what they did with the business and resources with which they were entrusted. Luke 12:13-21 (ESV).

Jesus's commands and Paul's teaching were not new but harken back to God's original and good design for both man and work in creation. In Genesis 2:15 (ESV), the Bible teaches that God, who created all things, called man primarily into a co-laboring relationship with Him; a relationship in which the earth and everything in it would be cultivated and God would be glorified.

As evidenced by the broad memberships and missions of the *amici curiae*, the cultivation to which men and women are called extends beyond working the ground to include numerous other spheres, including finance, education, the arts, medicine, science, architecture, and technology. According to the Scriptures, either these spheres will be cultivated in a manner that honors God by acknowledging His created order and purposes, or they will be cultivated in a manner that dishonors Him by neglecting His created order and purposes.

Vocation comes from the Latin word *vocare*, "to call." The understanding of vocational calling for a

follower of Jesus is that he or she is called to work in a manner that accords with God's will. This understanding of vocation is reflected in both Catholic and Protestant teaching.

The Catechism of the Catholic Church instructs that "[b]y reason of their special vocation it belongs to the laity to seek the kingdom of God by engaging in temporal affairs and directing them according to God's will." *Catechism of the Catholic Church*, ¶ 898 (1997). More specifically, in Pastoral Constitution of the Church in the Modern World, one of four constitutions emerging from Vatican II, the Roman Catholic Church teaches with regard to work that Christians are:

> ...as citizens of two cities, to strive to discharge their earthly duties conscientiously and in response to the Gospel spirit. They are mistaken who, knowing that we have here no abiding city but seek one which is to come,(13) think that they may therefore shirk their earthly responsibilities. For they are forgetting that by the faith itself they are more obliged than ever to measure up to these duties, each according to his proper vocation.(14) Nor, on the contrary, are they any less wide of the mark who think that religion consists in acts of worship alone and in the discharge of certain moral obligations, and who imagine they can plunge themselves into earthly affairs in such a way as to imply that these are altogether divorced from the

> religious life. This split between the faith which many profess and their daily lives deserves to be counted among the more serious errors of our age....Therefore, let there be no false opposition between professional and social activities on the one part, and religious life on the other. The Christian who neglects his temporal duties, neglects his duties toward his neighbor and even God, and jeopardizes his eternal salvation. Christians should rather rejoice that, following the example of Christ Who worked as an artisan, they are free to give proper exercise to all their earthly activities and to their humane, domestic, professional, social and technical enterprises by gathering them into one vital synthesis with religious values, under whose supreme direction all things are harmonized unto God's glory. *Gaudium et Spes*, ¶ 43 (1965).[4]

Addressing Christians in all spheres of life, including business, to follow their consciences in their calling from God, it continues: "Laymen should also know that it is generally the function of their well-formed Christian conscience to see that the divine law is inscribed in the life of the earthly city...." *Id.*

Both Martin Luther[5] and John Calvin[6] also spoke of a Christian obligation to live out his or her faith vocationally. Specifically, Calvin taught:

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[4] goo.gl/sWizby

[5] Marc Kolden, *Luther on Vocation*, 3 Word & World 382 (Oct. 1, 2001).

> The last thing to be observed is, that the Lord enjoins every one of us, in all the actions of life, to have respect to our own calling.... And that no one may presume to overstep his proper limits, he has distinguished the different modes of life by the name of callings. Every man's mode of life, therefore, is a kind of station assigned him by the Lord, that he may not be always driven about at random.... [I]t is enough to know that in everything the call of the Lord is the foundation and beginning of right action. He who does not act with reference to it will never, in the discharge of duty, keep the right path. *John Calvin Institutes of the Christian Religion, 3.10.6.*[7]

For Christians, a life of integrity requires there to be a unity of thought, belief, and action under the Lordship of Christ which cannot in good conscience be compartmentalized between church, home, and work.

Similarly, Judaism and Islam also teach that faith is to shape one's whole life and include sets of laws or commands which are to govern all aspects of their adherents' lives. In Judaism, there are commandments which govern when and how work

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[6] Alister McGrath, *Calvin and the Christian Calling*, 1999 First Things 94 (July 1999).

[7] goo.gl/CBSsvd

may be done.[8] In Islam, everyday business activities, including finance, must be in accordance with Sharia and submitted to Allah.[9]

Be they Christian, Jewish, Muslim, or other, adherents of the world's major and minor religions alike have come to this country to experience and enjoy America's first freedom, the freedom not just to believe something religious but to *exercise* religious beliefs in the public sphere and in the commercial marketplace without governmental compulsion or penalty. But with the ongoing proliferation of business regulations at all levels of government, the risk that this freedom will be chilled and suppressed is significant.

It is not hard to find present cases[10] or imagine future examples wherein the freedom to operate one's business in accordance with one's religious beliefs and vocation is threatened. The clearest examples are those involving creative and expressive businesses which seek to amplify and promote their clients' messages. From web-designers to wedding cake makers, to florists to publicists, many Americans help their clients express their messages but draw the line when their client's message is a message their faith prohibits them from promoting.

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[8] *See, e.g.*, Exodus 16:26-30 (ESV), 20:8-11 (ESV), 23:12 (ESV), Leviticus 23:3 (ESV), Deuteronomy 5:12-15 (ESV), Isaiah 58:13-14 (ESV), Haggai 1:8 (ESV).

[9] *See generally* Muhammad Ayub, *Understanding Islamic Finance* (2007).

[10] *See Footnote 3 above.*

Like Petitioners, while the *amici curiae* serve everyone, their faith may prohibit them from serving every message. The First Amendment secures their right to refrain from lending their artistic talent and voice to a message that contradicts their faith and should protect them from being targeted or singled out for their religious convictions.

Likewise, businesses which may not inherently be expressive or creative in nature may be subject to laws which compel conformance with values, messages, or standards which are contrary to well-established religious values and beliefs. For example, California is currently considering Senate Bill 219[11] which, if enacted, would require all nursing homes and caretakers to use a resident's preferred name and gender pronouns. Caretakers who "willfully and repeatedly fail to use a resident's preferred name or pronouns" will be guilty of a misdemeanor and risk jail time. *Id.* If such a law were to become the norm in the marketplace, owners and their workers in various industries who maintain that there are only two biological sexes and cannot promote a message contrary to their faith, *see, e.g.* Genesis 1:27 (ESV) ("So God created man in his own image, in the image of God he created him; male and female he created them"), will be forced to either abandon their faith or abandon their work.

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[11] goo.gl/B7EpSr

II. To Affirm the Constitution's Protection of Business Practices Which Are Compelled by Religious Beliefs, This Court Should Reconsider the Scope of *Employment Division v. Smith*.

As stated above, the *amici curiae* join with the Petitioners in their Free Speech arguments. They further agree that this Court should apply strict scrutiny in reviewing Colorado's application of the Colorado Anti-Discrimination Act ("CADA") because it allows for individualized exemptions and was clearly used in this instance to target disfavored religious views for punishment. Such laws are subject to strict scrutiny even under this Court's decision in *Smith*, 494 U.S. 872, 884 (1990).

If the Court disagrees with the Petitioners and determines Colorado's application of the CADA to be neutral and generally applicable, it should reconsider the scope of its holding in *Smith* and subject the state's actions to strict scrutiny. The notion that the state is free to force religious business owners to forego their religious precepts as a condition of entry into or cost of remaining in the marketplace is incompatible with the free exercise that the Framers of the Constitution envisioned.

While the Court in *Smith* accepted that the "exercise of religion" must be interpreted broadly to include "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons," 494 U.S.,

at 877, it held that the Free Exercise Clause provides religious adherents no protection from general and neutrally applicable laws. *Id.* Read narrowly, *Smith*, establishes that an individual seeking a government benefit, such as an unemployment compensation, may be disqualified from receiving that benefit if the terms of disqualification are general and neutrally applicable.

Read broadly and beyond the government benefit context, however, *Smith*'s holding, in the words of Justice O'Connor who concurred in the judgment but could not join in the majority's opinion, represented a dramatic departure "from well-settled First Amendment jurisprudence... and is incompatible with our Nation's fundamental commitment to individual religious liberty." *Id.* at 891.

Following an even broader reading of *Smith*, some courts have even determined that in order to enter the marketplace, businesspersons must conform their conduct to all neutral laws of general applicability and compromise their religious beliefs as "the price of citizenship." *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 92, 309 P.3d 53, 80. The notion that Americans, many of whom have fled to this country to enjoy the religious liberty the Constitution promises, must abandon their religiously motivated business practices in the face of any general and neutrally applicable law, regardless of how *manini* the state's interest, is contrary to the very reasons the Framers prioritized the protection of "free exercise" of religion in the Bill of Rights and

would strip it of any real meaning for businesspersons and their businesses.

As this Court pointed out, "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 33 (1947). As *Smith* was being decided, Constitutional law scholar and former Tenth Circuit Judge Michael McConnell succinctly summarized the two historical and competing postures towards free exercise jurisprudence in his law review *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 Harv. L. Rev. 1410 (199):

> Does the freedom of religious exercise guaranteed by the constitutions of the states and United States require the government, in the absence of a sufficiently compelling need, to grant exemptions from legal duties that conflict with religious obligations? Or does this freedom guarantee only that religious believers will be governed by equal laws, without discrimination or preference?

Judge McConnell persuasively argues from the generating history that the Framers of the First Amendment *did* intend for the Free Exercise Clause to protect religious adherents whose religious exercise was infringed by neutral laws of general

applicability. *Id.* In fact, the Framer's ultimate decision to replace "rights of conscience" with the broader term "exercise of religion" in the final, ratified version of the First Amendment is strong evidence of this intent. *Id.*

The question is not whether business practices may constitute religious exercise. This Court has long held and recently reaffirmed that, "[b]usiness practices that are compelled or limited by the tenets of a religious doctrine fall comfortably within [what this court has defined as protected religious exercise]." *Burwell v. Hobby Lobby Stores, Inc.* (*Hobby Lobby*), 134 S. Ct. 2751, 2769–70 (2014) *citing Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) and *United States v. Lee*, 455 U.S. 252, 257 (1982).

Rather, the question is whether and to what extent the Free Exercise Clause of the Constitution, after *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), provides any protection for businesspersons who are not seeking a government benefit like the plaintiff in *Smith* but simply seek to conduct their businesses in accord with their religious beliefs, even if their business practices may conflict with general and neutrally applicable laws.

Just as this Court has ruled that students and teachers do not "shed their constitutional rights at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), so too this Court should hold that Americans do not shed their

constitutional rights when they leave their temples, mosques, and cathedrals to enter the marketplace. The Free Exercise Clause is not limited to freedom of worship within the walls of the church, but guarantees freedom of exercise within the broader society. In view of the principles of limited government and religious liberty upon which this Country was founded and upon which the Constitution was framed, it should not be presumed that the government is justified in whatever action it takes and religious citizens should not bear such a great burden as an expansive interpretation of *Smith* requires to overcome that presumption.

While every worker is entitled to equal protection of the laws, this Court has recognized that the First Amendment gives special solicitude to religious persons. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012). Neither the text of the Free Exercise Clause nor the historical record reflect an intent to limit this special solicitude to clergy, rabbis, or clerics. In this vein, Justice Kennedy recognized the scope of free exercise in his concurring opinion in *Hobby Lobby* stating:

> In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than

> just freedom of belief. See *Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed.1213 (1940)*, It means, too, the right to express those beliefs and to establish religious (or) nonreligious) self-definition in the political, civic, and economic life of our larger community. *Hobby Lobby*, 134 S. Ct. at 2785.

As this Court's pre-*Smith* jurisprudence reflects, all Americans are to enjoy the free exercise of religion absent a compelling governmental interest to justify the government's restriction thereof. A law that can force a businesswoman to choose whether to abandon her religiously motivated business in order to stay in business imposes "the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

In *Sherbert*, by applying strict scrutiny under the two part test of compelling interest and the least restrictive manner, the Court balanced the competing religious and governmental interests in a manner that acknowledged that the Free Exercise Clause does more than enforce an equal protection claim. Though the religious claim may not always prevail given the interest of the government, it does provide for exemption from arguably neutral laws which burden sincerely held religious beliefs.

CONCLUSION

Masterpiece Cakeshop, Inc. and its owner Jack Phillips seek to freely exercise their religious convictions in the workplace, as do the members of the *amici* organizations which join in this brief. Following in the Scriptures and teachings of Jesus, and as long reflected in Christian tradition, they understand their Christian calling as indivisible, that all aspects of their lives, including their businesses or vocations, come under the lordship of Jesus. As such, they ask that, in addition to affirming the Petitioners' rights under the Free Speech Clause of the First Amendment, that this Court also reinvigorate the scope of the First Amendment's Free Exercise Clause so as to not force them to have to "render unto Caesar" that which properly belongs to God thereby violating their consciences and their commitment to the total lordship of Jesus.

Respectfully submitted,

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